STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY L. MASON,

Plaintiff-Counterdefendant-Appellee,

v

CLAUDE MATTHEW MASON,

Defendant-Counterplaintiff-Appellant.

UNPUBLISHED
April 14, 2005

No. 256885
Wayne Circuit Court
LC No. 03-312432-DM

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce awarding sole legal and physical custody of the parties' three minor children to plaintiff. Defendant sought joint legal and physical custody of the children. We affirm.

Relative to joint custody, defendant first argues that the trial court erred in finding that the parties were unable to cooperate and generally agree regarding issues affecting the welfare of the children. We disagree.

There are three different standards of review applicable to child custody cases. A trial court's factual findings, such as the existence of an established custodial environment and with regard to each factor affecting custody, are reviewed under the great weight of the evidence standard and will be affirmed "unless the evidence clearly preponderates in the opposite direction." *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003); *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998), citing MCL 722.28. However, a trial court's discretionary rulings, such as a court's determination on the issue of custody, are reviewed for an abuse of discretion. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). Further, pursuant to MCL 722.28, questions of law in custody cases are reviewed for clear legal error. *Fletcher*, *supra* at 24. "A trial court commits legal error when it incorrectly chooses, interprets, or applies the law." *Id.*

A custody dispute must to be resolved in the child's best interests. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Prior to ruling on the best interest of a child, a trial court must determine as a matter of fact the existence of an established custodial environment. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). Here, the trial court

concluded that an established custodial environment existed with both plaintiff and defendant, where they had been sharing joint custody of the minor children, and this conclusion of the court is not challenged on appeal. Pursuant to MCL 722.27(1)(c), the trial court must not change an established custodial environment unless "there is presented clear and convincing evidence that it is in the best interest of the child."

Pursuant to MCL 722.26a(1), when there exist "custody disputes between parents, the parents shall be advised of joint custody." "[T]he term 'joint custody' means an order that specifies either that 'the child shall reside alternately for specific periods with each of the parents,' or that 'the parents shall share decision-making authority as to the important decisions affecting the welfare of the child,' or both." *Wellman v Wellman*, 203 Mich App 277, 279; 512 NW2d 68 (1994), quoting MCL 722.26a(7). In determining a matter of joint custody, a trial court must consider the best interests of the child and whether "the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1); *Wilcox v Wilcox (On Remand)*, 108 Mich App 488, 495; 310 NW2d 434 (1981); see also *Mixon v Mixon*, 237 Mich App 159, 163; 602 NW2d 406 (1999). Such basic decisions include health care, education, and religion, along with matters of daily decision-making and discipline. *Fisher v Fisher*, 118 Mich App 227, 232; 324 NW2d 582 (1982). "If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children." *Id*. at 233; see also *Wellman*, *supra* at 279-280.

Here, the trial court found that the parties were uncooperative and generally disagreed on matters affecting the welfare of the children. The evidence at trial supported the trial court's findings that the relationship between plaintiff and defendant was acrimonious and that sole custody was necessary "to avoid the continual conflict which has plagued these children for longer than a year." There was evidence that, although both parties demonstrated concern for their children's needs, they were unable to communicate with each other on matters impacting their children. There was evidence that defendant often picked up the children early from day care without informing plaintiff. There was also evidence that defendant purchased the children new shoes and winter coats after plaintiff had previously purchased such items. Moreover, there was evidence that defendant failed to inform plaintiff when he took the children to the doctor. The parties disagreed over which of two school districts would be the best for the children. Although the two parties agreed on a temporary custody schedule, the parties disagreed over which party should have access to the family van and use of the marital home to accomplish that parenting schedule.

Given the record of animosity between the parties, we conclude that the trial court's findings concerning the lack of communication and cooperation between the parties were not against the great weight of the evidence.[1] We further conclude that the trial court properly

[1] We note that, in a pretrial hearing, counsel for defendant adamantly informed the court that the parties would not be able to decide anything together because of the animosity that had arisen between the two.

considered the fact that plaintiff and defendant were unable to communicate and cooperate when making its determination to award sole legal and physical custody of the children to plaintiff. See *Fisher*, *supra* at 232-233.

Defendant also claims that the trial court's findings on the best interest factors were against the great weight of the evidence. We disagree.

A trial court must resolve a custody dispute in the child's best interests by evaluating the factors delineated in MCL 722.23. *LaFleche v Ybarra*, 242 Mich App 692, 700; 619 NW2d 738 (2000). Here, the trial court evaluated each of the best interest factors and determined that the parties were essentially equal or not favored on factors (d), (e), (g), (h), and (j), that plaintiff was slightly favored on factors (a), (c), (f), and (k) and strongly favored on factor (b), and that factors (i) and (l) were inapplicable. Defendant contends that the evidence indicated that factors (a), (c), and (k) should have been equal to both parties.

Concerning factor (a) (the love, affection and other emotional ties existing between the parties involved and the child), MCL 722.23(a), the trial court determined that plaintiff was slightly favored, indicating that, while "both parties profess love for their children" and the children "return love to both parents," the evidence showed that "the children show more warmth and involvement to their mother" and that plaintiff "appears to be the one who tended more to their medical needs and their emotional needs." There was evidence that both parents loved their children and were involved in the children's education, school, and recreational activities. There was also evidence that plaintiff was the primary care giver when the children were babies and toddlers and stayed home doing activities and attending to the children's needs throughout the day. The children's daycare provider testified that plaintiff was more involved with the children and that the children seemed to be "more excited" to be with plaintiff. Additionally, the parties' neighbor testified that she saw plaintiff interacting with the children more often than she did defendant. As the trial court noted, there was evidence that defendant was involved in sports activities, including t-ball and gymnastics, with the children. However, there was also evidence that defendant was often at work during the hours the children were awake. With respect to the court's findings on this factor, we cannot conclude that the evidence clearly preponderates in the opposite direction. The trial court's findings regarding this factor are not against the great weight of the evidence.

Concerning factor (c) (the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs), MCL 722.23(c), the trial court determined that plaintiff was slightly favored. The trial court found that defendant was the "breadwinner" for the family, but plaintiff "is now working full time" and has "provided the children more so than the Defendant with food, clothing and medical care during the period proceeding this year." The trial court also found that plaintiff tended to provide the children with "more wholesome meals" than defendant. There was evidence that defendant has generally provided for the family's monetary needs. However, plaintiff began working full time in March 2003. There was evidence that both parties provided the children with meals, although defendant admitted to giving the children "pop tarts" and "Spaghetti-O's." There was also evidence that, prior to the separation, both parties purchased clothing and supplies for the children and that, since the separation, they both still contribute to such purchases. Plaintiff noted that defendant bought the children shoes and winter coats after she had purchased shoes and winter coats for

them. There was evidence that plaintiff was generally responsible for taking the children for haircuts, trimming their nails, and taking the children to the doctor. Plaintiff primarily took care of the two youngest children when they had complications as babies with a medical condition called "polystenosis." Moreover, although both parties knew one of the children was having problems with his ear, plaintiff contacted the child's doctor when his daycare provider discovered the ear infection. Generally, this Court will defer to the trial court's assessment of the evidence presented and the credibility of a witness. *Fletcher v Fletcher*, 447 Mich 871, 889-890; 526 NW2d 889 (1994). Given the evidence at trial and the trial court's discretion in matters of credibility, we conclude that the trial court's determination regarding this factor was not contrary to the great weight of the evidence.

Concerning factor (k) (domestic violence, regardless of whether the violence was directed against or witnessed by the child), MCL 722.23(k), the trial court determined that plaintiff was slightly favored because of "some evidence of verbal abuse by the Defendant of the Plaintiff." At trial, plaintiff testified that defendant was verbally abusive towards her. Plaintiff explained that defendant "gets right in my face and he will not stop and then he'll follow me around the house and just scream in my ear, just constantly screaming and won't let me talk to him or get a word in edgewise until I say he's right. . . . And I try to get away from him and he'll block my pathway so I couldn't leave and get away from him." Plaintiff contended that this has occurred in front of the children. The parties' neighbor testified that she often heard defendant yelling at plaintiff while the children were at home. In light of this evidence and the trial court's discretion in matters of credibility, we conclude that the trial court's determination of this factor is not against the great weight of the evidence.

Defendant further contends that the trial court impermissibly used its determination of factor (b) to form "the basis of the award of sole legal and physical custody" to plaintiff. Concerning factor (b) (the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any), MCL 722.23(b), the trial court determined that plaintiff was strongly favored for two reasons: (1) defendant exhibited a need to be in control, and (2) defendant had a practice of allowing their six-year-old daughter to sleep in his bed with him.

First, the trial court found that defendant "is very much in need of being in control of the children's lives and in the lives of the two parties." The trial court speculated that defendant's failure to notice that the twins were regressing was due to their acting differently around defendant, "responding to his desire to control the children." The trial court found that there was evidence of defendant yelling at plaintiff while the children were present and that defendant had exhibited "threatening behavior" toward the children's daycare provider.

Despite evidence that the twins were having accidents in their pants after having been previously potty trained, defendant testified at trial that he did not feel that the children seemed upset or confused and that he had not noticed any such accidents. Moreover, plaintiff testified that defendant would verbally abuse her in the children's presence, and the parties' neighbor testified that she had often heard defendant yelling at plaintiff while the children were home. The children's daycare provider testified that she no longer allowed defendant to enter her house when picking up the children because she became "very nervous" from defendant's habit of following her from room to room very closely.

Second, the trial court found disturbing defendant's testimony that he permitted his six-year-old daughter to regularly sleep in his bed with him. The trial court found that defendant's testimony had changed dramatically relative to this issue throughout the trial. The trial court noted that, when defendant initially took the stand, he testified that after he and plaintiff separated their daughter resumed sleeping with him. However, after defendant learned that the trial court was concerned about this behavior, defendant testified that his daughter would sleep with him only occasionally. The trial court stated:

> I don't think the Defendant or the Plaintiff fully understand how psychologically devastating this change in bedroom habits is to Lin[d]sey. She has obviously been telling both of you that there is pain here or confusion. Her outburst of crying, her wearing of a coat and backpack at school, the- - are symptoms of some real pain here. It's not the pain of the parties splitting necessarily, but in the Court's view the- - this is some evidence that the child is torn and confused by the role she's been asked to perform by her father.

The trial court noted that the evaluation report was incomplete because the parties failed to disclose this information during the court ordered evaluation and mediation. The trial court concluded that defendant was "wholly unaware of the danger" his actions presented and plaintiff was "somewhat blinded" to this danger as well. However, the trial court further concluded, "certainly [plaintiff's] actions with regard to the children seem far more natural and far more appropriate than the Defendant's interaction."

At trial, there was evidence that the parties' minor daughter had recently begun crying and refused to participate in certain school and extracurricular activities. There was also evidence that plaintiff and defendant joked about the fact that their daughter was their first child and they mistakenly either rocked her to sleep or allowed her to go to sleep with them. Defendant testified that, on the days he had parenting time with the children, his daughter "normally" slept with him in his bed. After the trial court became concerned about their daughter's habit of sleeping with defendant, it requested further testimony on the matter. Defendant reiterated that it was the practice for his daughter to sleep with plaintiff and defendant prior to plaintiff filing for divorce. Defendant asserted that, since the separation, if his daughter went to sleep before he did, he would put her in her own bed. He also asserted that the children had fallen asleep in the master bedroom, and defendant had left them there for the night. Plaintiff testified to having a conversation with defendant in which she told defendant not to sleep with their daughter in his underwear. Plaintiff warned that "she's getting too big, she's going to start asking questions." Plaintiff explained that, even if defendant wore more clothing, she still would not approve of her sleeping with defendant because "[s]he's getting older and she needs to be sleeping in her own bed." Defendant denied that plaintiff told him he needed to wear more clothing to bed. Defendant testified that he usually wears a t-shirt, underwear, and boxer shorts or pajama shorts to bed and in the winter wears sweat pants or pajama pants to bed.

Given the evidence of defendant's controlling behavior and his sleeping habits, we cannot conclude that the trial court's determination that this factor strongly favored plaintiff was against the great weight of the evidence. Furthermore, contrary to defendant's contention, the trial court based its ultimate decision of the custody issue on the totality of the best interest factors, not on the single issue of the appropriateness of the minor daughter sleeping in the same bed as defendant. The trial court determined that defendant was not favored on any of the factors

and was equal with plaintiff on only five of the factors. The trial court concluded that, "[i]n light of these factors, especially the- - my analysis of Factor B, physical and legal custody is awarded to the Plaintiff." Although the trial court emphasized that factor (b) played a significant role in its decision regarding the best interests of the children, the trial court considered each factor as contributing to its final decision. Therefore, the trial court did not commit clear error because it did not weigh factor (b) so highly as to prevail over the other factors. See *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). We hold that the trial court's findings of fact concerning the factors at issue were not against the great weight of the evidence.

In sum, we find that the trial court did not err in concluding that there existed clear and convincing evidence that the parties would be unable to cooperate and generally agree on matters involving the children and that it was in the best interests of the children to alter the joint custody arrangement that was implemented before trial and award sole legal and physical custody to plaintiff. The court's discretionary ruling regarding the ultimate custody decision did not constitute an abuse of discretion.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Stephen L. Borrello